

Kelo v. New London (2005)

Document Based Question for Advanced Placement U.S. History Classes and U.S. Government Classes

ADVANCED PLACEMENT U.S. GOVERNMENT AND POLITICS TOPICS

The enclosed activities for the *Kelo v. New London* (2005) lesson will help students address the following parts of the AP U.S. Government and Politics Course Outline:

I Constitutional Underpinnings of United States Government:

- A Considerations that influenced the formulation and adoption of the Constitution
- B Separation of powers
- C Checks and balances
- D Federalism

IV Institutions of National Government: ...the Federal Courts.

VI Civil Rights and Civil Liberties:

- A The development of civil liberties and civil rights by judicial interpretation
- B Knowledge of substantive rights and liberties

ADVANCED PLACEMENT U.S. HISTORY THEMES/ LEARNING OBJECTIVES

The enclosed activities for the *Kelo v. New London* (2005) lesson will help students address the following themes and learning objectives of the AP U.S. History Course:

- **Politics and Power 5:** Analyze how arguments over the meaning and interpretation of the Constitution have affected U.S. politics since 1787.
- **Politics and Power 7:** Analyze how debates over civil rights and civil liberties have influenced political life from the early 20th century through the early 21st century.
- **Work, Exchange, and Technology 8:** Understand how & why the role of the federal government in regulating economic life & the environment has changed since end of 19th century.

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KELO V. NEW LONDON (2005)

DIRECTIONS

Read the Case Background and Key Question. Then analyze the Documents provided. Finally, answer the Key Question in a well-organized essay that incorporates your interpretations of the Documents as well as your own knowledge of history.

CONSTITUTIONAL PRINCIPLES

*Limited government
Inalienable rights*

Case Background

In *Calder v. Bull* (1798), Justice Samuel Chase wrote that it “is against all reason and justice, for a people to entrust a Legislature with” the power to enact “a law that takes property from A. and gives it to B.” For a long time, the “public use” limitation was understood to require that the government actually use the property it was taking, for example to build a road, a school, a hospital, a prison or other government facilities.

But what if government takes private property because that property is run down, impoverished, deteriorating, or blighted, and the government plans to redevelop the property to more valuable, “private” uses? Ultimately, this question has proven difficult and controversial for the Supreme Court.

The Court first addressed these issues in *Berman v. Parker* (1954), a case in which the Court upheld a redevelopment plan targeting a blighted area of Washington, D.C. The Court unanimously held that the plan involved a “public use” because the plan, as a whole, served public purposes, even though much of the property would be leased or sold to private parties.

In 1998, the pharmaceutical company Pfizer built a new facility in New London, Connecticut. Seeking to improve the economic outlook of the area, the city’s New London Development Corporation offered to sell Pfizer additional land where the drug company would build a large resort/marina/condominium complex. Most of the residents of the affected neighborhoods accepted the city’s offer to purchase their property. However, Susette Kelo was one of 15 property owners who refused to sell. They maintained that the government does not have the constitutional power to take private property in order to turn it over to a private developer. The city then invoked its power of eminent domain in order to take the land. In *Kelo v. New London*, the Supreme Court was asked to determine whether the “public purpose” as intended by city government was the same thing as the Fifth Amendment’s “public use.”

TEACHING TIPS: KELO V. NEW LONDON

LEARNING OBJECTIVES

- Students trace the historical background of government power to take private property for public use.
- Students analyze modern examples of government taking of private property for public use.

ACTIVITIES

1. To set the stage for this lesson, provide half the class with a **copy of the Bill of Rights**, and the other half with **Document C, James Madison’s essay “On Property”**. Have students complete the following with their respective documents: Underline physical property and circle other types of property.

Have students form pairs or small groups that include both documents and discuss the ways they have marked them. Next, have students with the Bill of Rights go back through it, marking additional items that Madison considered to be included in the term, “property”.

Discuss the differences between the way Madison understood “property” and the way that term is commonly used today. What aspects of life in the neighborhood of one’s own choosing are part of one’s property rights?

2. See **Background Information on *Kelo v. New London***, p. 98. Discuss with students the context provided for **Document D, *Berman v. Parker (1954)***.
3. Have students analyze **Document D, *Berman v. Parker (1954)***, and answer the scaffolding questions.
4. Assign appropriate documents for student analysis.
5. Have students complete handout **Graphing Property Rights—*Kelo* DBQ**.
6. Use key question, “Evaluate the Court’s ruling in *Kelo v. New London*” for class discussion or writing assignment, focusing on the constitutional principles involved in the case.

See Appendix for additional Graphic Organizers.

BACKGROUND INFORMATION ON KELO V. NEW LONDON

Document A: Blackstone’s *Commentaries on the Laws of England* (1765)

Sir William Blackstone (1723–1780) was an English lawyer and judge whose *Commentaries on the Laws of England* provided an explanation of English common law. Blackstone’s work was very influential in the thinking of America’s Founders, and continues to be frequently used in modern legal reasoning.

Document D: *Berman v. Parker* (1954), Unanimous Opinion

“Urban blight” refers to decay of buildings and deterioration of neighborhoods that result from a number of causes, including overcrowding, an increase in criminal activity and lack of proper maintenance of the structures. In 1945, in order to correct blighted areas in Washington, D.C., Congress passed the District of Columbia Redevelopment Act, which created the 5-member District of Columbia Redevelopment Land Agency. The law gave this new agency the power of eminent domain, or the authority to seize private property after paying its owners a just price. After conducting surveys to identify neighborhoods in need of beautification, rebuilding, and “revitalization,” the Redevelopment Agency in 1950 published its plan to take over property in the District’s southwest quadrant, including Berman’s well-maintained and successful department store. About 5000 people lived in the area, 98% of them African American. According to the Agency’s surveys, 58% of the residential units had only outdoor toilets, 29% had no electricity, and 64% of the dwellings were beyond repair. The planning commission proposed to demolish the houses and businesses, create parks, streets, and schools for public use, and then lease or sell the remaining land to private developers who would build various kinds of structures specified in the Agency’s plan, including low-rent apartments. Berman and other owners of the department store brought suit against the planning commission, on the grounds that their property was not slum housing or otherwise blighted and it was unconstitutional for government to take property from one private owner to turn it over to another, even if the original property owner was paid. Justice William O. Douglas wrote the opinion for a unanimous Court.

Document E: *Poletown Neighborhood Council v City of Detroit* (1981)

Detroit, suffering a long-term economic downturn and high unemployment, planned to sell a large tract of land to General Motors. In return, General Motors agreed to develop a factory that promised to provide 6,000 permanent jobs. The area seized by Detroit was home to thousands of people, who were mostly Polish immigrants. About 1400 homes, more than 100 businesses, a major hospital, and several churches were on this land. The city claimed that the use of eminent domain served a public purpose because of the expanded tax revenue that would be generated by the factory. The Majority of the Michigan Supreme Court agreed with the city. The predicted greatly expanded tax base did not materialize and the factory fell far short of its promise of 6,000 jobs.

Document F: *County of Wayne v. Edward Hathcock* (2004), Michigan Supreme Court

In this case, Wayne County wanted to use the power of eminent domain to take citizens’ properties for the construction of a 1,300-acre business and technology park. This proposed commercial center was intended to re-invigorate the struggling economy of southeastern Michigan by attracting businesses, particularly those involved in developing new technologies, to the area. In this case, the Michigan Supreme Court unanimously overturned its ruling in *Poletown*.

Document K: “A Wreck of a Plan,” Charlotte Allen, July 17, 2005

After the *Kelo* decision, Charlotte Allen, a resident of Washington, D.C.’s southwest area, wrote a critique of the urban revitalization that resulted from the *Berman* decision.

KELO V. NEW LONDON

CONSTITUTIONAL PRINCIPLES

Limited government
Inalienable rights

KEY QUESTION

Evaluate the Court's ruling in *Kelo v. New London*.

- A Blackstone's *Commentaries on the Laws of England* (1765)
- B The Fifth Amendment (1791)
- C James Madison's *On Property* (1792)
- D *Berman v. Parker* (1954), Unanimous Opinion
- E *Poletown Neighborhood Council v. City of Detroit* (1981), Michigan Supreme Court
- F *County of Wayne v. Edward Hathcock* (2004), Michigan Supreme Court
- G New London (2004)
- H *Kelo v. New London* (2005) Majority Opinion
- I *Kelo v. New London* (2005), Dissenting Opinion
- J *Kelo v. New London* (2005), Dissenting Opinion
- K "A Wreck of a Plan," Charlotte Allen, *Washington Post* (2005)
- L Newspaper Accounts (2009)
- M Satellite View of Fort Trumbull (2010)

DOCUMENT A

Blackstone's *Commentaries on the Laws of England* (1765)

So great ... is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road ... were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without the consent of the owner of the land.

- 1. According to Blackstone, under what conditions may government take private property for the general good of the community?**

DOCUMENT B

The Fifth Amendment (1791)

No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

- 1. What protections for private property are listed in the Fifth Amendment of the U.S. Constitution?**
- 2. Are these protections meant to secure the rights of individuals (in the same way that other amendments protect freedom of religion, freedom of speech, etc.) or are they meant to secure the collective rights of communities (i.e. those who would benefit from the government taking the property)?**

DOCUMENT C

James Madison's *On Property* (1792)

A man's land, or merchandize, or money is called his property ... a man [also] has a property in his opinions and the free communication of them. He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them. He has a property very dear to him in the safety and liberty of his person. He has an equal property in the free use of his faculties and free choice of the objects on which to employ them.

In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.

Where an excess of power prevails, property of no sort is duly respected. No man is safe in his opinions, his person, his faculties, or his possessions.

That is not a just government, nor is property secure under it, where the property which a man has in his personal safety and personal liberty, is violated by arbitrary seizures of one class of citizens for the service of the rest....

If the United States mean to obtain or deserve the full praise due to wise and just governments, they will equally respect the rights of property, and the property in rights....

- 1. How does James Madison define property?**
- 2. Put this statement in your own words: "In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights."**
- 3. What does Madison say the U.S. government must do in order to be "wise and just"?**

DOCUMENT D

Berman v. Parker (1954), Unanimous Opinion

Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle.

It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

Once the object [goal] is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end.Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here, one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress, and Congress alone, to determine once the public purpose has been established....

The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes, but also schools, churches, parks, streets, and shopping centers....

The rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking.

- 1. Traditional approaches to the power of the state to condemn (or seize) private property were based on needs related to “(p)ublic safety, public health, morality, peace and quiet, law and order.” How did the *Berman* decision expand on that concept?**
- 2. The *Berman* Court reasoned, “In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them.” Do you agree? How deferential should Courts be to democratically-elected legislatures?**
- 3. The Court held that “the entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes, but also schools, churches, parks, streets, and shopping centers...” What means other than government seizure of property could have brought about the resources needed and/or desired by the people in a community?**

DOCUMENT E

Poletown Neighborhood Council v City of Detroit (1981), Michigan Supreme Court

This case raises a question of paramount importance to the future welfare of this state and its residents: Can a municipality use the power of eminent domain ... to condemn property for transfer to a private corporation to build a plant to promote industry and commerce, thereby adding jobs and taxes to the economic base of the municipality and state?

[Poletown Neighborhood Council] challenge[s] the constitutionality of using the power of eminent domain to condemn one person's property to convey it to another private person in order to bolster the economy. They argue that whatever incidental benefit may accrue to the public, assembling land to General Motors' specifications for conveyance to General Motors for its uncontrolled use in profit-making is really a taking for private use and not a public use because General Motors is the primary beneficiary of the condemnation.

The [city of Detroit] contend[s], on the other hand, that creat[ing] an industrial site will ... alleviate and prevent conditions of unemployment and fiscal distress. The fact that it will be conveyed to and ultimately used by a private manufacturer does not defeat this predominant public purpose.

The power of eminent domain is to be used in this instance primarily to accomplish the essential public purposes of alleviating unemployment and revitalizing the economic base of the community. The benefit to a private interest is merely incidental. If the public benefit was not so clear and significant, we would hesitate to sanction approval of such a project.

- 1. What arguments did the 4200 displaced Poletown residents make against Detroit's plan to take their property by eminent domain?**
- 2. What arguments did the city of Detroit make in favor of the plan?**
- 3. How did the Michigan Court answer the question?**

DOCUMENT F

***County of Wayne v. Edward Hathcock* (2004), Michigan Supreme Court**

We have concluded that this Court’s *Poletown* opinion is inconsistent with our eminent domain jurisprudence and advances an invalid reading of our constitution. Because that decision was in error and effectively rendered nugatory [invalid] the constitutional public use requirement, it must be overruled. It is true, of course, that this Court must not “lightly overrule precedent.” But because *Poletown* itself was such a radical departure from fundamental constitutional principles and over a century of this Court’s eminent domain jurisprudence leading up to the 1963 Constitution, we must overrule *Poletown* in order to vindicate our Constitution, protect the people’s property rights, and preserve the legitimacy of the judicial branch as the expositor—not creator—of fundamental law.

- 1. The Michigan Supreme Court held that its ruling in *Poletown* 23 years before had been “a radical departure from fundamental constitutional principles.” What principles do you think the Court meant?**

DOCUMENT G

New London (2004)



*Susette Kelo's street before redevelopment. Image courtesy of New London Landmarks, Inc., via Professor Tom Metzloff, *Voices of American Law*, Duke Law*



*Fort Trumbull street scene. Image courtesy Eric McAfee, *American Dirt* (<http://dirtamericana.blogspot.com>, November 25, 2009)*

- 1. Do these images depict “Miserable and disreputable housing conditions”? Do they depict “distressed” conditions?**
- 2. Do these images depict businesses likely to bring significant new tax revenue to the city of New London?**

***Kelo v. New London (2005)***

[T]his is not a case in which the City is planning to open the condemned land—at least not in its entirety—to use by the general public. Nor will the private lessees of the land in any sense be required to operate like common carriers, making their services available to all comers. But although such a projected use would be sufficient to satisfy the public use requirement, this “Court long ago rejected any literal requirement that condemned property be put into use for the general public.” Indeed, while many state courts in the mid-19th century endorsed “use by the public” as the proper definition of public use, that narrow view steadily eroded over time.

Not only was the “use by the public” test difficult to administer (e.g., what proportion of the public need have access to the property? at what price?), but it proved to be impractical given the diverse and always evolving needs of society. Accordingly, when this Court began applying the Fifth Amendment to the States at the close of the 19th century, it embraced the broader and more natural interpretation of public use as “public purpose.”...

The disposition of this case therefore turns on the question whether the City’s development plan serves a “public purpose.” Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field.

Those who govern the City were not confronted with the need to remove blight in the Fort Trumbull area, but their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference. The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including—but by no means limited to—new jobs and increased tax revenue. As with other exercises in urban planning and development, the City is endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts. To effectuate this plan, the City has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development. Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in *Berman*, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment....

In affirming the City’s authority to take petitioners’ properties, we do not minimize the hardship that condemnations may entail, notwithstanding the payment of just compensation. We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose “public use” requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised. This Court’s authority, however, extends only to determining whether the City’s proposed condemnations are for a “public use” within the meaning of the Fifth Amendment to the Federal Constitution. Because over a century of our case law interpreting that provision dictates an affirmative answer to that question, we may not grant petitioners the relief that they seek.

- 1. How did the Court explain its interpretation of “public use” as “public purpose”?**
- 2. In what ways was this case similar to *Berman*?**
- 3. In what ways was this case similar to *Poletown*?**
- 4. The 5-4 ruling observes that the city had “carefully formulated an economic development plan that it believes will provide appreciable benefits to the community.” What means other than government planning are available for ensuring that a community thrives economically?**
- 5. What does the Court say about how its ruling may apply to states?**

DOCUMENT I

Kelo v. New London (2005), Dissenting Opinion

The specter of condemnation hangs over all property. Nothing is to prevent the state from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.

Finally, in a coda, the Court suggests that property owners should turn to the states, who may or may not choose to impose appropriate limits on economic development takings. This is an abdication of our responsibility. States play many important functions in our system of dual sovereignty, but compensating for our refusal to enforce properly the Federal Constitution (and a provision meant to curtail state action, no less) is not among them.

- 1. According to this dissenting Justice, how was the Court neglecting its responsibility?**

DOCUMENT J

Kelo v. New London (2005), Dissenting Opinion

The consequences of today's decision are not difficult to predict, and promise to be harmful. So-called "urban renewal" programs provide some compensation for the properties they take, but no compensation is possible for the subjective value of these lands to the individuals displaced and the indignity inflicted by uprooting them from their homes. Allowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities....

The Court relies almost exclusively on this Court's prior cases to derive today's far-reaching, and dangerous, result. But the principles this Court should employ to dispose of this case are found in the Public Use Clause itself...

According to this dissenting Justice:

- 1. on what did the Court base its decision?**
- 2. on what should the Court have based its decision?**
- 3. which communities will be most harmed by the ruling?**

DOCUMENT K

“A Wreck of a Plan,” Charlotte Allen, July 17, 2005

The sorry truth is that governments aren't very good at rejuvenating neighborhoods. Revitalization is strictly a job for the private sector, as our own experience here in Southwest Washington is proving....

Think of Detroit demolishing the entire ethnic neighborhood of Poletown in the 1980s to build a General Motors plant that never delivered on its promised 6,000 new jobs....

Government entities, for all their subsidies, bond issues and eminent domain powers, almost always fail badly at effective urban revitalization, and those failed attempts almost always exact an appalling human cost in the form of lost homes, neighborhoods, businesses and jobs. In the District, the most spectacular recoveries of moribund urban zones – Capitol Hill over the decades, downtown and Columbia Heights almost overnight – have occurred almost entirely by way of individual consensual transactions, building by building.

- 1. What is Allen's general assessment of urban revitalization projects over time?**
- 2. What does Allen believe is the best solution to urban blight?**

DOCUMENT L

Newspaper Accounts (2009)

“Pfizer to leave city that won land-use case.”

New York Times, November 12, 2009

“Look what they did,” [Michael] Cristofaro said on Thursday. “They stole our home for economic development. It was all for Pfizer, and now they get up and walk away.”

Pfizer, the giant drug company, [has] announced it would leave the city just eight years after its arrival ... It would leave behind the city’s biggest office complex and an adjacent swath of barren land that was cleared of dozens of homes to make room for a hotel, stores and condominiums that were never built.

“After the Homes are Gone.”

San Francisco Chronicle, November 28, 2009.

The land where Susette Kelo’s little pink house once stood remains undeveloped. The proposed hotel-retail-condo “urban village” has not been built. And earlier this month, Pfizer Inc. announced that it is closing the \$350 million research center in New London that was the anchor for the New London redevelopment plan, and will be relocating some 1,500 jobs.

- 1. Describe Pfizer’s presence in New London eight years after the ruling in *Kelo v. New London*.**
- 2. How much economic development did New London gain from its deal with Pfizer?**
- 3. How does the fact that the promised economic benefit never materialized affect your assessment of the case? If an economic boom had followed, would that have justified the takings?**

DOCUMENT M

Satellite View of Fort Trumbull (2010)



Bing.com

1. What signs of economic development can be seen in this satellite photo of property seized for economic development?

DIRECTIONS

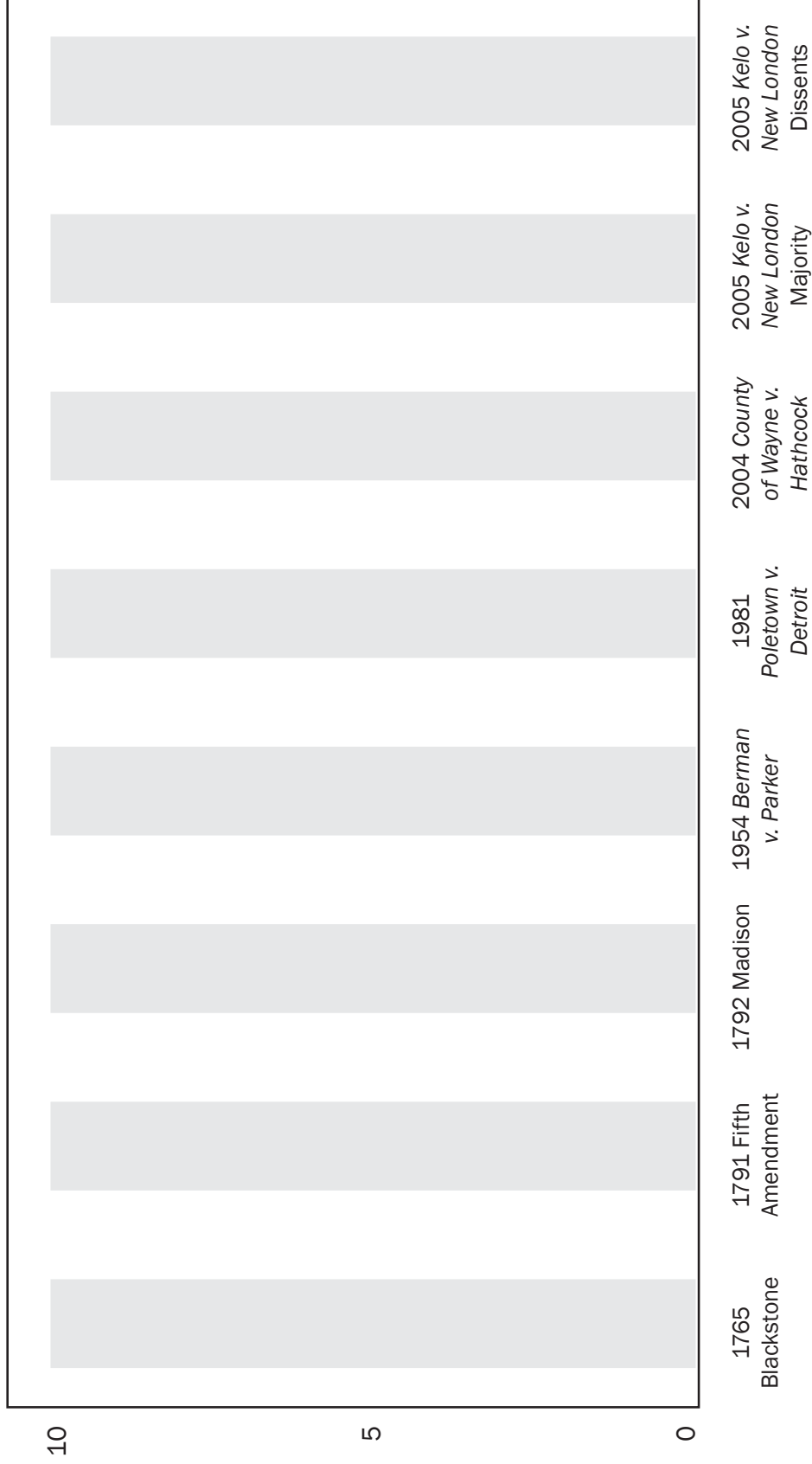
Read the Case Background and Key Question. Then analyze the Documents provided. Finally, answer the Key Question in a well-organized essay that incorporates your interpretations of the Documents as well as your own knowledge of history.

KEY QUESTION

Evaluate the Court's ruling in *Kelo v. New London*.

GRAPHING PROPERTY RIGHTS KELO V. NEW LONDON




For each document or case listed on the table below, assign a score on a scale of 1 – 10, showing to what extent property rights were supported.

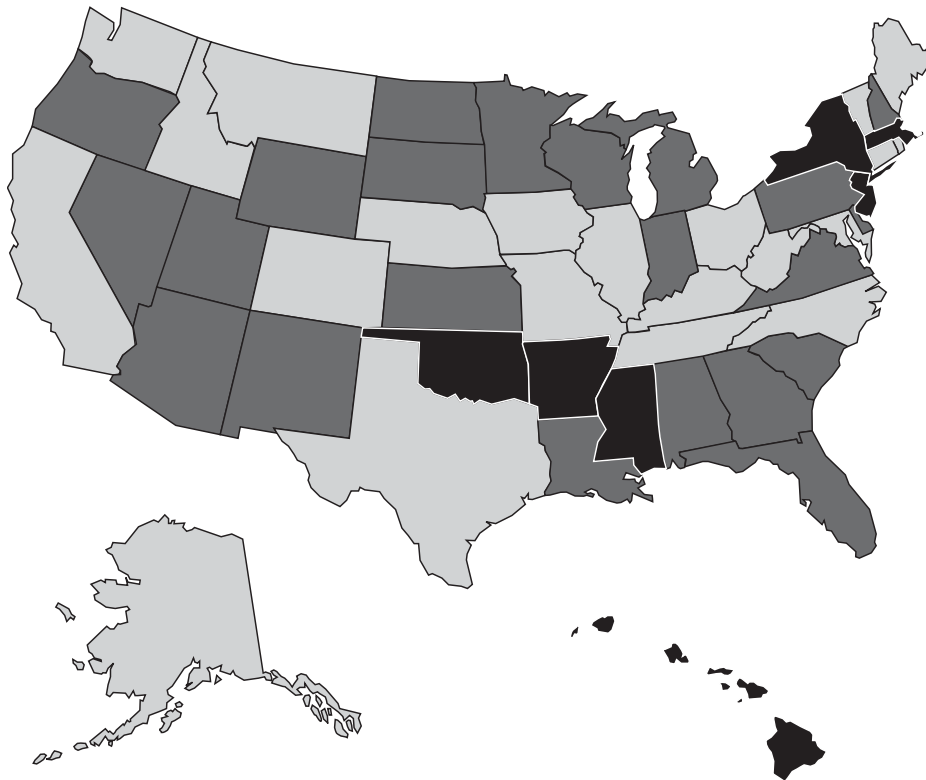


THE ISSUE

ENDURES

Eminent Domain Status Legislation Since *Kelo*, 2012

-  Substantive eminent domain reform (22)
-  Increased eminent domain protections (21)
-  State needs eminent domain reform (7)



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KELO V. NEW LONDON

1. How does this map illustrate the principle of federalism?
2. This map was created by Institute for Justice, which represented Susette Kelo in the *Kelo v. New London* case. Why do you think they label some states the map in terms of states that “need eminent domain reform.”?

SUPPLEMENTARY PRIMARY SOURCES RELATED TO PROPERTY RIGHTS

Use these document excerpts to supplement the document-based lessons in this unit, or to make your own document-based questions.

Petition of Right, Sir Edward Coke, 1628

IV. And in the eight-and-twentieth year of the reign of King Edward III, it was declared and enacted by authority of parliament, that no man, of what estate or condition that he be, should be put out of his land or tenements, nor taken, nor imprisoned, nor disinherited nor put to death without being brought to answer by due process of law.

- ▶ **Under what conditions could the king take the life, freedom, or property of an individual?**

Only by due process of law

Massachusetts Body of Liberties & Constitution, 1641

[8] No man's Cattle or goods of what kinde soever shall be pressed or taken for any publique use or service, unless it be by warrant grounded upon some act of the generall Court, [Massachusetts legislature] nor without such reasonable prices and hire as the ordinarie rates of the Countrie do afford. And if his Cattle or goods shall perish or suffer damage in such service, the owner shall be sufficiently recompenced. (Massachusetts Colonial Laws, p. 35)

- ▶ **Rephrase this provision in your own words.**

No one's livestock or other property will be taken for use by the community unless the legislature has passed a law allowing for it. Government must pay property owners a fair price for any property taken.

Pennsylvania Constitution, 1776

VIII. That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expense of that protection, and yield his personal service when necessary, or an equivalent thereto: But no part of a man's property can be justly taken from him, or applied to public uses, without his own consent, or that of his legal representatives...

- ▶ **According to this document, what responsibilities correspond to the rights to enjoy life, liberty, and property?**

Pay taxes, personal service (for example, in the military)

- ▶ **What conditions must be met if property is taken for public use?**

Owner's consent or a law passed by legal representatives

Virginia Declaration of Rights, 1776

VI. That elections of members to serve as representatives of the people, in Assembly, ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed or deprived of their property for public uses without their own consent, or that of their representatives so elected, nor bound by any law to which they have not, in like manner, assented, for the public good.

- ▶ **In addition to property rights, what other rights are listed in this passage?**

Free elections, the right of suffrage (voting)

- ▶ **What are some possible reasons that the people of Virginia restricted the right to vote to “all men having sufficient evidence of permanent common interest with and attachment to the community”?**

People committed to a location are the ones with a stake in the outcome whenever voting takes place. In this way, property rights are central to the principle of consent of the government. Owning property in a community can be a signal that one is personally attached and invested in it – not only in terms of money, but also possibly in terms of time and personal commitment to remain there.

The Northwest Ordinance, 1787

...No man shall be deprived of his liberty or property but by the judgment of his peers, or the law of the land; and should the public exigencies make it Necessary for the common preservation to take any person’s property, or to demand his particular services, full compensation shall be made for the same; and in the just preservation of rights and property it is understood and declared that no law ought ever to be made, or have force in the said territory, that shall in any manner whatever interfere with, or affect private contracts or engagements bona fide and without fraud, previously formed.

- ▶ **Other than property rights, what additional rights are listed in this passage from the Northwest Ordinance?**

Writ of habeas corpus, trial by jury, proportional representation in the legislature, court proceedings based on common law, reasonable bail and fines, protection against cruel and unusual punishment, jury trial before a person is deprived of liberty or property

- ▶ **How are these rights related?**

All of them have been considered part of the definition of liberty at least as far back as Magna Carta

- ▶ **What specific property rights are addressed in the passage?**

No deprivation of property without due process; full compensation for private property taken by the government; protection of private contracts

Woodrow Wilson “Socialism and Democracy,” 1887

... ‘State socialism’ is willing to act through state authority as it is at present organized. It proposes that all idea of a limitation of public authority by individual rights be put out of view, and that the State consider itself bound to stop only at what is unwise or futile in its universal superintendence alike of individual and of public interests. The thesis of the state socialist is, that no line can be drawn between private and public affairs which the State may not cross at will; that omnipotence of legislation is the first postulate of all just political theory.

... For it is very clear that in fundamental theory socialism and democracy are almost if not quite one and the same. They both rest at bottom upon the absolute right of the community to determine its own destiny and that of its members. Men as communities are supreme over men as individuals. Limits of wisdom and convenience to the public control there may be; limits of principle there are, upon strict analysis, none. ...

The difference between democracy and socialism is not an essential difference, but only a practical difference—is a difference of *organization* and *policy*, not a difference of primary motive. Democracy has not undertaken the tasks which socialists clamour to have undertaken; but it refrains from them, not for lack of adequate principles or suitable motives, but for lack of adequate organization and suitable hardihood; because it cannot see its way clear to accomplishing them with credit...

- ▶ **According to Wilson, what is the proper limit on public authority over individual rights?**

The State [should] consider itself bound to stop only at what is unwise or futile in its universal superintendence alike of individual and of public interests.

- ▶ **Which does Wilson assert is more important—community or individuals?**

Community

- ▶ **Put this phrase in your own words: “the absolute right of the community to determine its own destiny and that of its members.”**

The community’s right to make decisions for itself and for its members is unlimited. (Accept reasoned responses.)

- ▶ **Why has democracy not attempted the same tasks as socialism has?**

Democracy is not well-organized or courageous enough to do so.

PRIVATE PROPERTY VOCABULARY

Bundle of Sticks: Metaphor for the complex nature of property rights. Each “stick” in the bundle represents a right associated with property. *Examples: possession, the right to sell, mortgage, or subdivide property, the right to exclude others from property, grazing rights, mineral rights, etc.*

Due Process: Understand that the government must follow established rules and procedures when dealing with persons accused of crimes, or when taking property for public use.

Easement: A certain, limited right to use property owned by another. *Examples: A strip of land enabling people to cross a beach over a private property.*

Eminent Domain: Name for government’s power to seize private property for public use.

Just Compensation: Payment—usually fair market value—required by the Fifth Amendment when government takes property for public use.

Police Power: The power of state governments to protect the safety, health, welfare, and morals of citizens.

Property Rights: A system where individuals have the right to obtain and control possessions, as well as the fruits of their own labor.

Property: Something physical or intangible that is owned by a person or group. *Examples: land, businesses, homes, cars, blueprints, computer coding, creative works, secret formulas, etc.*

Rule of Law: a free government requires that laws follow stable, transparent processes, and cannot be changed on the whim of a ruler.

APPENDIX

TEACHER TOOLBOX

Classroom Applications

Case Briefing Sheet

Constitutional Issue Evidence Form

Documents Summary

Attorney Document Analysis

Moot Court Procedures

Tips for Thesis Statements and Essays

Rubric for Evaluating a DBQ Essay on a 9-Point Scale

Key Question Scoring Guidelines for All Essays

CLASSROOM APPLICATIONS

Scaffolding questions are provided as an option. Teachers of AP or honors classes may choose not to have students write answers to these.

Context/Background information for some documents is provided as an option to brief students on historical/legal context and significance.

DBQ Strategies:

- Write the Key Question on the board and give each student a copy of one document. Ask this question: Does this document help you to answer this question? If so, how? If not, what additional information might you need? Allow students 3-4 minutes to answer these questions. Then, have students pair up, sharing their documents and answering the same questions. Have each pair join another and repeat the process. Finally, bring the entire class together and answer the Key Question as a group.
- Write the Key Question on the board and spend one class period having students analyze documents and answer the scaffolding questions, followed by one class period writing their answers to the key question.
- Divide students into pairs or trios and assign one or more documents per group. Then ask groups to report on their documents to the class, being sure that they explain how their specific documents can help to answer the Key Question.
- Go over DBQs as a large group, using scaffolding questions and key questions as discussion prompts.
- Give students the documents from a case and have them craft a key question.
- Have students complete a Case Briefing Sheet (see p. 231) to reinforce key concepts.
- Have students determine for each document which side would be more likely to use it in oral argument of the case. (See graphic organizers, p. 232.)
- Conduct a Moot Court presentation (see p. 235 for directions).
- Lightning Round Moot Court: This strategy might be especially helpful to provide a quick review of a number of cases. Assign two students to each case—one to present the petitioner’s position and one to present the respondent’s. Each student has two minutes to present his/her position to the entire class, which then must vote on this question: Is the law in question a valid exercise of government power under the relevant constitutional principles?
- Have students conduct research to discover more details about the people involved in a case, and then report to the class.
- Develop an illustrated timeline to depict changes and trends in interpretation of a given constitutional principle.
- Develop political cartoons to highlight the important issues in a case.

ONLINE RESOURCES

Consult any of the following websites for additional resources to learn more about the Supreme Court and landmark cases.

<http://billofrightsinstitute.org/resources/educator-resources/landmark-cases/>
www.oyez.org
<http://www.streetlaw.org/en/landmark.aspx>
<http://www.supremecourt.gov/>
<http://www.law.cornell.edu/supct/cases/name.htm>
<http://www.scotusblog.com/>

CASE BRIEFING SHEET

Case Name and Year: _____

Facts of the Case: _____

What is the constitutional question that the Supreme Court must answer?
(This is a yes/no question and spells out the specific part of the Constitution at issue.)

What constitutional principles are indicated in the case? _____

Summary of one side's arguments:

Summary of the other side's arguments:

How would you decide the case and why? _____

How did the Supreme Court majority decide the case and why? _____

What were the main points raised in any dissenting opinions? _____

What other Supreme Court cases are related in important ways? _____

CONSTITUTIONAL ISSUE EVIDENCE FORM

How would you use the documents provided to answer the constitutional question?

Case Name and Year:

Constitutional Issue:

Yes (Source/Evidence)	No (Source/Evidence)

DOCUMENTS SUMMARY

Use this form to develop an overview of the evidence available.

Document name & date	Author	Answer to scaffolding question	How each side might use this document to answer the Key Question —OR— What is the main idea of this document?

ATTORNEY DOCUMENT ANALYSIS

Use this form to show which attorney would probably use each document provided, and why.

Petitioner	Both sides	Respondent
Additional notes: How did majority/dissenting opinions align with each attorney's position?		

MOOT COURT PROCEDURES

Preparation

- Encourage students to use the background knowledge they have developed. Attorneys and Justices of the U.S. Supreme Court apply a great deal of background and historical knowledge.
- Caution students that “gotcha” questions within the classroom context are not productive. “Justices” should not ask questions that, based on their background and class activities, would not be fair game.
- Decide whether students will be allowed to use online resources via their smartphones during the exercise—there are good arguments both for using and for not using them.
- Recommendation—do not allow “Justices” to interrupt the attorneys in the first time or two that you run moot courts. They can ask their questions at the end of each attorney’s oral arguments.
- Encourage teamwork among “attorneys” in their presentations. Each team should have a lead attorney, but others will help fill in as needed.

Divide class into 3 groups: 9 Justices, advocates for the petitioner, and advocates for the respondent (A fourth group could be journalists.)

- Give time for planning: Justices decide what questions they want answered in oral arguments; advocates for each side plan their oral arguments.
- Allow equal time for presentation of each side, including interruptions from Justices (or not—your choice). In the U.S. Supreme Court, each side has 30 minutes, and the Justices interrupt continuously.
- Justices deliberate and announce decision. Deliberation is actually done in strict privacy in the U.S. Supreme Court conference, but you decide for your class.

At the beginning of each session of the Supreme Court, the Marshal of the Court (Court Crier) announces:

“Oyez! Oyez! Oyez! All persons having business before the Honorable, the Supreme Court of the United States, are admonished to draw near and give their attention, for the Court is now sitting. God save the United States and this Honorable Court!”

The Chief Justice will begin the oral argument phase by saying, “Petitioner, you may begin.”

The petitioner’s attorney says, “Mr. Chief Justice, and may it please the Court...”

Debrief: Discuss both the content of the case (Constitutional principle and its application) and the processes employed. Consider thinking and planning process, civil discourse process, and the application of these skills outside the classroom.

TIPS FOR THESIS STATEMENTS AND ESSAYS

Thesis Statement: The thesis statement condenses your arguments to a nutshell and appears in the opening paragraph, but it is not written until AFTER you have planned your overall response. (Planning process shown in table below.)

A good thesis statement—

- Fully addresses all parts of the prompt, while acknowledging the complexity of the issue.
- Clearly takes a side—makes a declarative statement that one thing was more important, more persuasive, etc. than another. Since the verb in the prompt is often something like “assess” or “evaluate,” the thesis statement should show which side the writer takes.
- Suggests a “table of contents ”or road map for the essay—shows what elements enter into consideration.
- Begins an essay that is proven by abundant and persuasive facts and evidence.

In a DBQ essay, the student writes a well-organized response to target a specific prompt, analyzing pertinent documents in order to support his/her thesis. The steps described here will guide the process of handling the documents. (For Advanced Placement US History the response must include BOTH outside information AND information from the documents. On US History AP exams, one of the essays that must be written under timed conditions is the DBQ.)

DBQ Do and Don't

Steps	Do	Don't
1. Analyze the prompt and divide it into its components. A graphic organizer helps with this step.	Fully address the prompt. It is better to address all parts of the prompt, even if you must do some in a way that is less complete, than to spend all your time on just one of two parts or 3 of 4 parts.	Neglect part of the prompt because you spent too much time on the part you know more about.
2. Plan to prove your point. It is best to begin by planning the overall structure BEFORE even looking at the documents.	Organize your thoughts before writing the thesis statement. What are the logical points your essay needs to include?	Write a “laundry list” that simply summarizes each document.

Steps	Do	Don't
3. Check the documents to see how you can use them as tools.	Strive to use all the documents; but be sure you accurately understand their main ideas.	Take quotes or ideas out of context to use them in a manner other than the author intended.
4. Ask yourself when writing every paragraph: "How does this help to prove my thesis?"	Analyze to prove the position asserted in the thesis statement. Analysis is not the same thing as description or narrative. Merely making a series of true statements is not analysis. Key to analysis—is the essay answering the "So what?" question?	Use 1st-or 2 nd -person pronouns "I think the Supreme Court has the authority to use judicial review because..." "Have you ever wondered how the Supreme Court got the authority to overturn federal laws?"
5. Manage time wisely; writing long quotes will eat up thinking time.	Use relevant facts, evidence, proof. A well-chosen brief phrase in quotations and worked into your own sentence is powerful.	Use lengthy quotes. Pad the paper in an attempt to conceal a lack of analysis.
6. Give credit to sources.	Cite sources using the author's name and/or document title.	Write "According to Document B,..."
7. Think as you write!	Let logic and analysis drive the essay.	Let documents drive the essay.

RUBRIC FOR EVALUATING A DBQ ESSAY ON A 9-POINT SCALE

Adapted from AP US History guidelines

Score (Grade)	Thesis	Analysis (tends to be the most difficult component)	Entire Prompt	Documents	Outside Info (required for AP class)	Organization & Writing Skill	Errors
8-9 (95-100)	Contains a well-developed thesis which clearly addresses all aspects of the prompt and shows organizational roadmap	Effective analysis which shows & proves relationships; fully answers the “so what?” questions; more analytical than narrative.	Addresses all aspects of the prompt, though coverage may be slightly uneven	Effectively and appropriately uses all—(or almost all) documents “The angels are starting to sing!”	Supports thesis with substantial and relevant outside information.	Clearly organized & well-written—evident on first reading, but we’ll read it again just for pleasure. “Call the President; he needs to hear this essay!”	May contain minor errors. “Get this writer to proofread your next paper!”
5-6-7 (80-85-90)	Contains a thesis which addresses the prompt	Limited analysis; mostly descriptive; knowledge & comprehension level in use of facts	Slightens or neglects some parts of the prompt	Uses some documents effectively	Supports thesis with some outside information	Acceptable organization; language errors do not interfere with comprehension and do not indicate misunderstanding of the topic	May contain errors that do not seriously detract from quality of the essay
2-3-4 (65-70-75)	Presents a limited, confused and/or poorly developed thesis	Simplistic explanations that do not indicate mastery of the content; may list facts without analysis	Deals with one aspect of the prompt in a general way or with additional parts in a superficial way	Quotes or briefly cites some documents, but does not use them as tools to support thesis	Contains little outside information	Demonstrates weak organizational and/or writing skills which interfere with comprehension	May contain major errors
0-1 (60 & below)	Contains no thesis or a thesis which does not address the prompt	Shows inadequate or inaccurate understanding of the prompt	Ignores part of the question	Contains little or no understanding of the documents or ignores them completely	Includes inappropriate, off-target, or no outside information	Is so poorly organized or written that it is difficult to understand	Contains numerous errors, both major and minor
-	Response is completely off-target. Examples: “I didn’t have to pay for this exam and I’m not wasting my time on it”; “I know nothing about the prompt, but let me tell you about snow-boarding...”; “My former boyfriend is the world’s biggest jerk and here’s why...”						

KEY QUESTION SCORING GUIDELINES FOR ALL ESSAYS

The Good-Excellent Essay

- Asserts a strong, clear, and well-developed thesis in response to the key question.
- Supports the thesis with outstanding analysis of Founding documents, custom, legal precedent and contemporary views.
- Intelligently applies and/or critiques the Court's opinion(s).
- Effectively uses many documents and incorporates prior knowledge.
- Contains only minor errors; is clearly organized and exceptionally well-written.

The Average-Good Essay

- Asserts a thesis in response to the key question.
- Supports the thesis with some analysis of Founding documents, custom, legal precedent and/or contemporary views. Analysis of some aspects may be cursory or absent.
- Critiques and/or applies the Court's opinion(s), but may demonstrate less command of nuance than the Good-Excellent Essay.
- Effectively uses many documents and incorporates prior knowledge.
- Contains few significant errors; is acceptably organized and written.

The Below Average-Average Essay

- Asserts a limited thesis or does not fully address the key question.
- Analysis is largely incomplete, superficial, or incorrect; may merely paraphrase or quote documents.
- Contains simplistic or incorrect application/critique of the Court's opinion(s).
- Uses few documents and incorporates little prior knowledge.
- Contains some significant errors and is poorly organized and written.

The Poor-Below Average Essay

- Lacks a thesis.
- Exhibits inadequate understanding of the question and the documents.
- Offers no application/critique of the Court's opinion(s).
- Uses very few documents and incorporates no prior knowledge.
- Contains numerous significant errors and is poorly organized and written.

Document H: Beachfront Management Act, South Carolina Department of Health and Environmental Control Summary (1988)

1. Protecting life and property from storms, providing tourism revenue, preventing unwise development too close to the beach and dunes.
2. 1988

Document I: *Lucas v. South Carolina Coastal Council* (1992)

1. He intended to build two single family homes.
2. Yes.
3. In 1988, the state legislature enacted the Beachfront Management Act, which barred Lucas from erecting any permanent habitable structures on his land.
4. Accept reasoned answers.
5. Accept reasoned answers.

Document J: *Lucas v. South Carolina Coastal Council* (1992), Dissenting Opinion

1. The area had been unstable and vulnerable to flooding for decades.
2. He finds no evidence to support the premise that the restrictions preventing Lucas from building homes on his property make it totally valueless; States had traditionally been entitled to the presumption of constitutionality. In this case, the state was being asked to prove that its regulation was not a taking.

Document K: *Lucas's Property* (1994)

1. Accept reasoned answers.
2. There are few, if any, other vacant lots.

Document L: *The Site of Lucas's Former Property* (2000)

1. The beach appears to have more sand and the dunes are not as low. A pink, 5,000-square foot house has been built in one of Lucas's former two lots.

KELO V. NEW LONDON (2005)

Document A: *Blackstone's Commentaries on the Laws of England* (1765)

1. Only by consent of the owner

Document B: *The Fifth Amendment, 1791*

1. Listed are protection against being deprived of life, liberty, or property without due process; guarantee of just compensation if one's property is taken for public use.
2. Individual rights

Document C: *James Madison's On Property* (1792)

1. Property includes not only physical possessions but also one's opinions, person, faculties [talents], possessions, safety, liberty, religion, labor, and choices of how to spend one's time.
2. The concept of "property" includes such physical things as one's possessions, but one's rights, such as those listed in the essay, are also a type of property that no just government would violate.
3. Protect all property rights.

Document D: *Berman v. Parker* (1954)

1. Under this ruling, it was now within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as safe. If those who governed the District of Columbia decided that the Nation's Capital should be beautiful as well as sanitary, there was nothing in the Fifth Amendment that would stand in the way. If the object was within the authority of Congress, the power to realize it through the exercise of eminent domain was clear.
2. Accept reasoned answers.

3. The free market: individual, consensual transactions, private enterprise, charities, institutions such as churches, non-profits, and other voluntary groups. Government means such as tax incentives.

Document E: *Poletown Neighborhood Council v. City of Detroit* (1981), Michigan Supreme Court

1. It was wrong and unjust to take property from one owner and turn it over to the private use of another.
2. The city maintained that the public purpose of the taking was economic growth.
3. The court accepted the city's argument that economic redevelopment by private entities is a "public use" that justifies the taking of private property. Detroit was allowed to follow through on its plan to take the property and turn it over to General Motors.

Document F: *County of Wayne v. Edward Hathcock* (2004), Michigan Supreme Court

1. Rights to private property, commitment to the rule of law.

Document G: *New London* (2004)

1. No; maybe
2. No

Document H: *Kelo v. New London* (2005)

1. The Court cited its use of that definition in its rulings since the close of the Nineteenth Century.
2. Both cases: would be settled based on the redevelopment commission's comprehensive plan, not on a piecemeal basis; involved elected officials (Congress/New London City Council) delegating authority to unelected bodies (District of

Columbia Redevelopment Land Agency/NLDC) to draw up plans to take private property for "public purposes" or the "public welfare;" involved the desire of government to enhance the economic climate in a location; had a particular impact on individuals with relatively little economic power; did not result in the promised economic benefit to the community.

3. In both cases: numerous individuals who did not wish to sell their property were forced to move so that a city government could transfer their property to private businesses; the promised economic benefit to the community did not materialize.
4. The free market: individual, consensual transactions, private enterprise, charities, institutions such as churches, non-profits, and other voluntary groups. Government means such as tax incentives.
5. States may place stricter limits on the use of eminent domain by law or in their own constitutions.

Document I: *Kelo v. New London* (2005), Dissenting Opinion

1. According to this justice, the majority did not enforce the Fifth Amendment's "public use" requirement, which meant that all private property was now subject to government taking for private economic development. Further, the majority was abdicating its responsibility to enforce the Fifth Amendment to the extent it recognized that some states might impose stricter limits because it is the Court's duty to enforce the Bill of Rights. It is not a task that the Court can or should leave to the States.

**Document J: *Kelo v. New London* (2005),
Dissenting Opinion**

1. The Court’s prior cases which read “public use” to mean “public purpose.”
2. The text of the Constitution, which requires a “public use.”
3. Poor communities, i.e., those most likely to be deemed by governments to be in need of economic redevelopment in an attempt to increase such “blighted” neighborhoods’ value and the economic benefit to the community and the local government.

Document K: “A Wreck of a Plan,” Charlotte Allen, *Washington Post* (2005)

1. Government entities almost always fail badly at effective urban revitalization, at the expense of lost homes, neighborhoods, businesses and jobs.
2. The free market, i.e. individual consensual transactions

Document L: Newspaper Accounts (2009)

1. Pfizer left the city.
2. Virtually nothing.
3. Accept reasoned answers.

Document M: *Satellite View of Fort Trumbull* (2010)

1. None

The Issue Endures

1. The vast majority of states have responded to the *Kelo* ruling by enacting reforms providing greater protection for property owners than the Court was willing to enforce in its ruling.
2. This label reveals the Institute for Justice’s viewpoint that the use of eminent domain for redevelopment is unjust.

UNIT 3 – CIVIL AND ECONOMIC FREEDOM

**EXPLORING CIVIL AND
ECONOMIC FREEDOM**

Critical Thinking Questions

1. The Founders understood that property is the natural right of all individuals to create, obtain, and control their possessions, beliefs, faculties, and opinions as well as the fruits of their own labor.
2. The Federalists feared that listing certain rights would lead people to think that the rights not listed were less important.
3. Accept reasoned responses.
4. Accept reasoned responses.

5. Accept reasoned responses.
6. Accept reasoned responses.

**DBQ: LIBERTY AND THE
SUPREME COURT**

Document A: John Locke, *Second Treatise of Civil Government* (1690)

1. lives, liberties and estates; his own person; labor of his body, and the work of his hands
2. for the preservation of their property
3. When we remove something from the state of nature and mix it with it our own labor, we make it our property.